

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MAY 16, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Brooks' House of Bar-B-Q's, Inc.**

Serial No. 75/509,001

Mark Levy of Salzman & Levy for Brooks' House of Bar-B-Q's, Inc.

Cynthia Esparza Crockett, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney)

Before Seeherman, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Brooks' House of Bar-B-Q's, Inc. has appealed from the refusal of the Trademark Examining Attorney to register the mark BROOKS' HOUSE OF BAR-B-Q'S DRIVE-IN RESTAURANT and

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design, as shown below, for "barbecue sauce, marinade, chicken sauce, and meat seasoning."¹

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the marks BROOKS for "processed shelf-stable tomatoes, processed shelf-stable tomatoes with seasoning and chili mix, tomato sauce, tomato sauce with seasonings and chili sauce"² and BROOKS in script form (shown below) for "canned foods, namely, catsup, barbecue sauce, beans with chili gravy, kidney beans and

¹ Application Serial No. 75/509,001, filed June 22, 1998, asserting first use and first use in commerce on November 21, 1996.

² Registration No. 1,752,721, issued February 16, 1993. A partial Section 8 affidavit was filed, as a result of which certain goods (tomato juice, vegetable juice and tomato juice beverages and vegetable juice beverages) were deleted from the registration. This occurred after the issuance of the first Office action, and therefore the copy of the registration provided by the Examining Attorney with that action did not reflect this deletion. The deleted goods had no bearing on the examination of this application, nor do they have a bearing on this appeal, since the Examining Attorney's position with respect to likelihood of confusion does not rest on the presence of the juices in the registration. A Section 15 affidavit was received.

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red beans,"³ previously registered by the same entity, as to be likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed, but an oral hearing was not requested.

Preliminarily, we note that the final Office action repeated the requirement that applicant submit a disclaimer of "HOUSE OF BAR-B-Q'S and DRIVE-IN and RESTAURANT" and that applicant has provided such a disclaimer with its reply brief. Therefore, we consider this requirement to be discharged, and the disclaimer has been entered into the record.

We must also deal with two evidentiary points. Applicant has, with its reply brief, submitted a print-out from the U.S. Patent and Trademark Office's records showing the results of a search for BROOKS. Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of the appeal. Because this submission is manifestly untimely, it has not been considered.⁴ The Examining Attorney has also objected to

³ Registration No. 532,325, issued October 24, 1950; Section 8 affidavit accepted; Section 15 affidavit received; renewed twice.

⁴ Even if it had been timely made of record, it would not affect our decision herein, since it lists merely the marks, without any

applicant's listing, in its brief, of "fifteen pairs of marks that [applicant] claims were not found to be confusingly similar." p. 12. The Examining Attorney bases this objection on the fact that applicant did not submit copies of the registrations. The Examining Attorney's objection is not well taken, since applicant's purpose in referring to these marks (which do not include any BROOKS marks) was to show other instances in which likelihood of confusion was not found, rather than to have them treated as evidence of third-party registrations. Although we have considered the listing of these marks, they are of little persuasive value because applicant did not provide the case citations, and therefore we cannot ascertain the factors or the reasoning which led to the findings of no likelihood of confusion.

Turning then to the substantive issue of likelihood of confusion, our determination is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between

indication of the goods or services with which they are associated.

the goods. **Federated Food, Inc. v. Fort Howard Paper Co.**,
544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the goods, applicant's barbecue sauce, marinade, chicken sauce and meat seasoning is in part identical and in part closely related to the goods in the cited registration. In particular, both applicant's application and Registration No. 532,325 include barbecue sauce in the identification of goods,⁵ while the tomato sauce and chili sauce listed in Registration No. 1,752,721 are closely related to barbecue sauce, chicken sauce and marinade in applicant's application, in that both applicant's and registrant's products can be used as sauces for meat. We also note, in this connection, that tomato paste is one of the ingredients of applicant's barbecue sauce.

These identical or closely related goods must be deemed to travel in the same channels of trade, and be sold to the same classes of consumers.

⁵ Applicant makes the argument that registrant's identification is for "canned foods, namely... barbecue sauce," while applicant's goods are not sold in cans. However, applicant's identification is for barbecue sauce, per se, and therefore would encompass canned barbecue sauce. In any event, whether applicant's goods are sold in bottles and registrant's goods in cans is a distinction without a difference. Both products are barbecue sauce and would be sold in the same stores, in close proximity to each other.

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We turn next to a consideration of the marks, noting that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." **Century 21 Real Estate Corp. v. Century Life of America**, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Although marks must be compared in their entireties, it is well established that there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. See **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, applicant's mark consists of what appears to be a sign. Although it includes references to HOUSE OF BAR-B-Q'S, DRIVE-IN and RESTAURANT, it is clearly the word BROOKS' which is the primary source-identifying word in the mark. The other words merely suggest that applicant's products originate with a drive-in restaurant. The design of a butcher with an ax chasing a chicken, which is prominently featured, still has a subsidiary role in that it suggests that the products are for use on meat. Moreover, when a mark consists of both words and design features, it is the word portion which is most likely to be impressed upon the purchaser's memory and serve as an

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indication of source. See **In re Appetito Provisions Co.**, 3 USPQ2d 1553 (TTAB 1987); **In re Mack**, 197 USPQ 755 (TTAB 1977). In the case of applicant's mark, it is the word BROOKS' which consumers are likely to use when asking for the goods, and it is this word which will be remembered and relied upon to identify the goods.

Although there are differences in the marks because of the additional wording and design features in applicant's mark, these differences are not sufficient to distinguish the marks. Applicant's and registrant's goods are relatively inexpensive items, purchased by the general consumer. Such consumers will not engage in an extended analysis of the marks to determine whether the additional design and word elements in applicant's mark indicate that applicant's goods emanate from a different source than registrant's goods. Rather, these casual purchasers are likely to view applicant's mark as merely a variant of the registrant's two BROOKS marks, and regard them all as indicating a single source for the products.

Applicant makes the argument that the registrant's marks are devoid of secondary meaning. It is not clear to us exactly what point applicant is attempting to make, since Registration No. 532,325 was registered pursuant to the provisions of Section 2(f), which indicates a

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determination by the Office that the mark has acquired distinctiveness. As for Registration No. 1,752,721, this mark was registered by the Office without resort to Section 2(f), which indicates that the Office considered it to be inherently distinctive. To the extent that applicant is asserting that the registrant's marks should be accorded a limited scope of protection because there are third-party registrations for BROOKS marks, this argument must fail. Applicant asserts that there are 105 third-party registrations for BROOKS marks, but has made of record only five such registrations. And of these five registrations, three are clearly for unrelated goods, i.e., precast concrete products, fabrics and bird seed. The only registrations for foods or food-related services are BROOKS FARMS and design for sausages and BROOK'S STEAK HOUSE & CELLAR for restaurant services. There are clearly greater differences between the marks and/or goods and services in these registrations and the marks and goods of registrant and applicant than there are between applicant's and registrant's marks and goods. In short, these third-party registrations are not sufficient to persuade us that registrant's BROOKS marks are entitled to such a limited scope of protection that applicant can register its very similar mark for identical or closely related goods.

Similarly, we are not persuaded by applicant's evidence of use of the BROOKS FARMS and BROOK'S STEAK HOUSE & CELLAR marks that the public would not be confused by applicant's use of its BROOKS' and design mark on goods identical or closely related to the goods listed in registrant's registrations. Moreover, the third-party use evidence (i.e., a listing of BROOKS FARM SAUSAGE on a price list from Schwarz Sausage Co. that includes a large number of meat items, and a menu from Brook's Steak House & Cellar, location unidentified), is not sufficient to show that the public has been so exposed to various BROOKS marks used by different entities that they would look to other elements in the marks as source-identifiers.

Applicant asserts that there have been no instances of actual confusion since it began using its mark in November 1996. However, there is no evidence in the record as to the extent of applicant's use, such that we can determine whether there has been any meaningful opportunity for confusion to occur. Nor do we have any information about whether registrant has encountered any confusion. Given these factors, as well as the relatively inexpensive nature of the products (as a result of which consumers who were confused might not bring such confusion to applicant's attention) and the notorious difficulty in proving actual

confusion, we cannot conclude that confusion is not likely to occur.

Applicant also makes the point that it did not choose its mark with the intent of deriving benefits from the reputation of registrant's marks. Although bad faith in adopting a mark is a strong indication that confusion is likely, the opposite does not hold true. Even if a party adopts a mark in good faith, the public may be confused if that mark is confusingly similar to another's mark, and the marks are used on identical or related goods.

We will not further burden this opinion with a discussion of all of applicant's arguments, many of which, frankly, are inapposite to the present case. For example, applicant argues that registrant's marks are generic "in the sense that the word simply conveys the impression of a person's name associated with particular goods." Brief, p. 13. Obviously, under the statute and case law, BROOKS would not be considered a generic term for food products. Moreover, this is an impermissible attack on registrant's registrations; if applicant actually believed that the marks were generic and the registrations should be cancelled, it should have brought a cancellation proceeding.

Applicant has also cited case law for propositions that are inapposite to the case at hand. For example, it cites **Reynolds & Reynolds Co. v. I.E. Systems, Inc.**, 5 USPQ2d 1749 (TTAB 1987) for the proposition that "a customer would not believe that all food preparation products emanate from the same source simply because they are provided under similar marks." Brief, p. 12. However, in this case applicant's and the registrant's goods are not merely "food preparation products"; they are, for example, the identical goods, barbecue sauce, or the highly related goods, barbecue sauce and chicken sauce, on the one hand, and tomato sauce and chili sauce, on the other.

Having considered all the relevant du Pont factors, we find that applicant's mark, used on its identified goods, is likely to cause confusion with the two cited registered marks.

Decision: The refusal of registration is affirmed.

E. J. Seeherman

D. E. Bucher

T. E. Holtzman
Administrative Trademark Judges
Trademark Trial and Appeal Board